

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES ANTHONY DIESSO,

Petitioner,

No. CIV S-03-2485 LKK KJM P

vs.

KNOWLES, Warden,

Respondent.

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prison inmate proceeding pro se with a petition for a writ of habeas corpus under 28 U.S.C. § 2254. He challenges his Solano County conviction for murder, possession of a weapon by a prisoner, battery by a prisoner, the findings that he had two prior serious felony convictions and that he had served a prior prison term as well as the resulting sentence of 135 years to life.

I. Background

The state Court of Appeal's thorough factual summary is fairly supported by the record:

Guilt Phase

During the guilt phase of the trial, the prosecution presented the following testimony. In June 1998, defendant was a prisoner at CMF and was housed in the "I" wing in cell 308 with Jeffrey Ford.

1 The I wing houses prisoners with a psychiatric history who have
2 had problems in the prison system. On June 29, just before 4:00
3 a.m., Lieutenant Michael Ross found defendant in his cell banging
4 on the door and saying something Ross could not understand; the
5 cell was dark and Ross had a hard time seeing inside. He saw what
6 appeared to be blood on defendant's forehead. Defendant moved
7 away from the cell door and Ross saw him grab his cellmate and
8 toss him off the lower bunk and into the wall, after which Ford fell
9 on the floor. Defendant said, "Get it out of here."

6 Ross testified that when defendant was taken out of the cell, he was
7 covered in blood and had a "wide-eyed look." Investigating
8 officers entered the cell and found that Ford was dead; his body
9 was lying face down against the wall. There were bloody
10 handprints all over the walls and trash and other items strewn about
11 the cell. The autopsy revealed that Ford died from ligature
12 strangulation and blunt force trauma to the head.

10 Later on the same day, June 29, 1998, two other incidents occurred. First,
11 after defendant was removed from his cell in the early morning he was
12 placed in a medical examination room, where the correctional officers
13 decided to change his restraints. In the course of the transfer of the
14 handcuffs, defendant broke away and hit one of the officers in the face,
15 knocking him down and knocking another officer into the wall. Both were
16 briefly rendered unconscious. In the afternoon, two officers from the
17 Investigative Services Unit went to talk to defendant. They found two
18 other officers trying to persuade defendant to give up a razor blade he had
19 in his possession. Instead, defendant took the razor blade, wrapped some
20 plastic around it, placed it in his mouth, took a drink from a milk carton
21 and swallowed the razor blade.

16 Defendant made several statements about these incidents. On July
17 3, 1998, he told one officer that he was "trippin" and "that was not
18 him," but he did not say to which incident he was referring. Also
19 on July 3, he told another officer that he did not recall what
20 happened on the day of the murder, but only remembered being
21 escorted down the hallway from his cell with blood all over him.
22 On July 7, a correctional officer overheard defendant talking with
23 another inmate, Nicholas Mecca. Defendant bragged about
24 swallowing the razor blade and bragged that he had sent two
25 officers to the hospital.

22 In late December 1998, defendant asked to speak to the
23 Investigative Services Unit and requested an interview with the
24 District Attorney's office. In January 1999, he provided a written
25 confession and verbally confessed, giving details of the murder of
26 his cellmate Jeffrey Ford.

25 Several inmates testified about defendant's behavior both before
26 and after Ford's murder. James Deckard had previously been
defendant's cellmate, and had asked to be moved because

1 defendant kept Deckard up all night talking to himself, and
2 walking around. Deckard thought defendant was not in control of
3 his faculties. He testified that when defendant was not receiving
4 his medication, he was uncontrollable. Before the murder
5 defendant told Deckard that he was planning on killing another
6 inmate by choking him, and that he intended to put blood and
7 satanic signs on the wall so that he would be sent to the mental
8 hospital at Atascadero based on a not guilty by reason of insanity
9 verdict. Deckard also testified that defendant had a tattoo saying
10 "NLR" which stood for "Nazi Low Riders," a person "that doesn't
11 like any other race but himself." However, Deckard did not think
12 that defendant was affiliated with that group.

13 Another inmate, Ray Ochoa, had been housed with defendant on
14 previous occasions before Ford was killed. Ochoa testified that
15 defendant had mood changes, talked to himself and walked around
16 aimlessly. On one occasion defendant told Ochoa he was dressing
17 like a girl in order to make himself appear mentally ill. He also
18 told Ochoa how to swallow razor blades, how to go on a hunger
19 strike, how to overdose on medication and how to otherwise fake
20 symptoms of mental illness. Defendant said he was going to kill
21 an inmate called Stephanie by strangling him and that he would go
22 to the mental hospital afterwards because he was going to put
23 things on the wall with blood and act crazy. Ochoa testified that on
24 the night of the killing, defendant was trying to get the officers's
25 attention and the officer did not respond to him. Ochoa saw
26 defendant come out of his cell the night of the murder, and he
testified that defendant seemed "out of it."

A third inmate, Nicholas Mecca, was housed in the Administrative
Segregation wing of CMF when defendant was housed there after
June 29. Mecca testified that defendant told him he had killed a
"punk," meaning a homosexual. He asked Mecca to testify that he
(defendant) was "having psych problems" and was crazy. He told
Mecca that the killing did not have anything to do with
psychological problems and that he never had a psychotic break,
but he wanted Mecca to help him make it seem that was what had
happened. Mecca testified that a few days before the killing,
defendant told him he was going to kill a punk with a razor blade
he had received from another inmate. At some point in time
defendant told Mecca that "he was gonna do it" in order to become
a Nazi Low Rider.

During the guilt phase, the defense called two mental health
experts. Dr. Dean Clair, a psychologist, reviewed records but was
unable to meet with defendant because he refused to submit to an
interview. In May 1997, Dr. Clair had interviewed defendant for a
prior offense and had concluded at that time that defendant was *not*
psychotic. Based on his past contact with defendant and on the
files he reviewed for the current offense, Dr. Clair's opinion was
that as of the date of the current offense defendant *was* psychotic as

1 a result of an organic mental disorder. Dr. Clair's opinion was
2 based in part on defendant's history of seizure disorder with
blackouts, resulting from childhood brain trauma.

3 Dr. Herb McGrew, the second mental health expert called by the
4 defense, was appointed by the court to evaluate the defendant. Dr.
5 McGrew, a psychiatrist, had evaluated defendant once for a prior
6 offense and twice for the current offense. The first time he
7 evaluated defendant, in 1997, Dr. McGrew found him incompetent
8 to stand trial, and defendant was sent to Atascadero. As to the
current offense, Dr. McGrew's opinion was that defendant "was
extremely and extraordinarily disturbed" and likely psychotic at the
time of the murder. However, Dr. McGrew also testified that he
felt that defendant was manipulative, and he questioned whether
defendant was giving accurate information.

9 Defense counsel argued that at the time of the murder defendant
10 was suffering from a mental disease or defect that rendered him
incapable of forming the requisite intent to commit murder. The
11 jury found defendant guilty on all counts. At the reading of the
verdicts defendant made a verbal outburst and pushed over counsel
12 table, and was removed from the courtroom.

13 Sanity Phase

14 The parties stipulated that the jury could consider all of the guilt
15 phase evidence during the sanity phase. At the sanity phase the
16 same doctors returned to the stand. Dr. Clair testified that in his
17 opinion defendant was legally insane at the time of the murder. He
18 based his opinion in part on the fact that defendant suffered from a
convulsive disorder, and people with such disorders often have
uncontrollably violent episodes in which they lose the ability to
distinguish right from wrong. Moreover, defendant had a history
of instability and violent acting out and might not have been taking
his medication. The fact that defendant killed his cellmate "under
19 circumstances where it would be inescapable that he would be
20 charged with that" suggested an inability to link behavior and
consequences. He found defendant's behavior in general to be
totally irrational. He also noted that in the period leading up to the
crime, defendant had been telling others that voices were
tormenting him. From the fact that defendant acted coherently
both before and after the murder, Dr. Clair concluded that
22 defendant is "transiently psychotic." He opined that all indications
23 were that defendant was not in control of himself at the time of the
murder.

24 Dr. McGrew also testified that defendant was legally insane at the
25 time of the murder. He believed that at the time of these offenses
defendant was not capable of making any rational decision about
whether killing Ford was right or wrong. The prosecutor suggested
26 the murder was rational because it was gang-related. Dr. McGrew

could only guess that defendant did not commit the murder for gang-related reasons, but because he was out of control.

The defense called Dr. Stephen Estner, a board certified psychiatrist, appointed by the court. Based on his examination of defendant and his review of the records Dr. Estner concluded that at the time of the murder defendant met the criteria for legal insanity in that he was unable to distinguish right from wrong. Dr. Estner also testified that people with mental illness can fluctuate to the point where they are lucid before and after a crime but insane at the time the crime is committed.

Michael Pappa, a captain with the Department of Corrections, testified for the prosecution about defendant's arraignment hearing, during which appellant lunged at his attorney and "head-butted" him, and then spit on the bailiff. The court had defendant removed from the public courtroom and held in a secure cell adjacent to the courtroom, where the court questioned defendant, who did not respond to the court's questions. A week later, the court again attempted to arraign defendant, who once again refused to speak. When the court explained it could not accept defendant's not guilty by reason of insanity plea unless defendant personally entered the plea, defendant responded to the court's questions and entered his plea.

Officer Fermin Rubio testified to an incident in 1997 where defendant stabbed another inmate 17 times because the inmate had called defendant "a snitch." Rubio testified that the inmate had the reputation as an "effeminate homosexual." He also testified to an in-court incident in April 1999, where defendant lunged at and attempted to assault his attorney.

Answer, Ex. A (Court of Appeal opinion) at 3-8.

II. Standards Under The AEDPA

An application for a writ of habeas corpus by a person in custody under a judgment of a state court can be granted only for violations of the Constitution or laws of the United States. 28 U.S.C. § 2254(a). Federal habeas corpus relief also is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (referenced herein in as “§ 2254(d)” or “AEDPA”). See Ramirez v. Castro, 365 F.3d 755, 773-75 (9th Cir. 2004) (Ninth Circuit affirmed lower court’s grant of habeas relief under 28 U.S.C. § 2254 after determining that petitioner was in custody in violation of his Eighth Amendment rights and that § 2254(d) does not preclude relief); see also Lockyer v. Andrade, 538 U.S. 63, 70-71 (2003) (Supreme Court found relief precluded under § 2254(d) and therefore did not address the merits of petitioner’s Eighth Amendment claim).¹ Courts are not required to address the merits of a particular claim, but may simply deny a habeas application on the ground that relief is precluded by 28 U.S.C. § 2254(d). Lockyer, 538 U.S. at 71 (overruling Van Tran v. Lindsey, 212 F.3d 1143, 1154-55 (9th Cir. 2000) in which the Ninth Circuit required district courts to review state court decisions for error before determining whether relief is precluded by § 2254(d)). It is the habeas petitioner’s burden to show he is not precluded from obtaining relief by § 2254(d). See Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

The “contrary to” and “unreasonable application” clauses of § 2254(d)(1) are different. As the Supreme Court has explained:

A federal habeas court may issue the writ under the “contrary to” clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the “unreasonable application” clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court’s application of clearly established federal law is

¹ In Bell v. Jarvis, 236 F.3d 149, 162 (4th Cir. 2000), the Fourth Circuit Court of Appeals held in a § 2254 action that “any independent opinions we offer on the merits of constitutional claims will have no determinative effect in the case before us At best, it is constitutional dicta.” However, to the extent Bell stands for the proposition that a § 2254 petitioner may obtain relief simply by showing that § 2254(d) does not preclude his claim, this court disagrees. Title 28 U.S.C. § 2254(a) still requires that a habeas petitioner show that he is in custody in violation of the Constitution before he or she may obtain habeas relief. See Lockyer, 538 U.S. at 70-71; Ramirez, 365 F.3d at 773-75.

1 objectively unreasonable, and we stressed in Williams [v. Taylor,
2 529 U.S. 362 (2000)] that an unreasonable application is different
from an incorrect one.

3 Bell v. Cone, 535 U.S. 685, 694 (2002). A state court does not apply a rule different from the
4 law set forth in Supreme Court cases, or unreasonably apply such law, if the state court simply
5 fails to cite or fails to indicate an awareness of federal law. Early v. Packer, 537 U.S. 3, 8
6 (2002).

7 The court will look to the last reasoned state court decision in determining
8 whether the law applied to a particular claim by the state courts was contrary to the law set forth
9 in the cases of the United States Supreme Court or whether an unreasonable application of such
10 law has occurred. Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002), cert. dismissed, 538 U.S.
11 919 (2003). Where the state court fails to give any reasoning whatsoever in support of the denial
12 of a claim arising under Constitutional or federal law, the Ninth Circuit has held that this court
13 must perform an independent review of the record to ascertain whether the state court decision
14 was objectively unreasonable. Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). In other
15 words, the court assumes the state court applied the correct law, and analyzes whether the
16 decision of the state court was based on an objectively unreasonable application of that law.

17 It is appropriate to look to lower federal court decisions to determine what law has
18 been "clearly established" by the Supreme Court and the reasonableness of a particular
19 application of that law. See Duhaime v. Ducharme, 200 F.3d 597, 598 (9th Cir. 1999).

20 /////

21 /////

22 /////

23 /////

24 /////

25 /////

26 /////

1 III. Petitioner's Request To Represent Himself

2 A. Background

3 During the course of pretrial proceedings, petitioner filed several Marsden²
 4 motions to relieve his series of appointed lawyers and several Faretta³ motions seeking to
 5 represent himself. CT 45-50, 55-60, 64-69 (Marsden motions); CT 75-79, 82-85, 89-93 (Faretta
 6 motions). The court gave petitioner a written advisement, which petitioner filled out and filed
 7 with the court. In it petitioner acknowledges his understanding of his legal rights, the advantages
 8 of having a lawyer, the disadvantages of self-representation, and the nature of the charges and the
 9 possible consequences. CT 105-109 (Faretta advisement and waiver). At the hearing on
 10 February 28, 2000, the court reviewed these topics with petitioner, who affirmed his
 11 understanding of the problems attendant upon self-representation. 2/28/00 RT 4-9. The court
 12 warned petitioner that "if you represent yourself and then you engage in the acting-out behavior
 13 which unfortunately you have done time and time again, that you'd be removed from the
 14 courtroom, and there's not going to be anybody here to represent you." 2/28/00 RT at 5. Later,
 15 the court asked petitioner "what can you tell me to cause me to believe you when you tell me you
 16 are not going to act out in the future?" Petitioner said:

17 Well, just my word and the fact that I've – I have acted
 18 inappropriately in your courtroom, but at the same time, I realize it
 19 hasn't done any good for me. If anything, it's made things worse,
 and I'm not planning on trying to make anything worse than they
 already are.

20 2/28/00 RT 9. The prosecutor objected "primarily based on his disruptiveness." Id. Defense
 21 counsel also urged the court not to grant the motion because of "the complicated nature of this
 22 case, there's also an NGI defense" 2/28/00 RT 10. Petitioner interjected that his "behavior
 23 in court and what takes place in prison is two separate different things." Id. at 11. The court
 24 mused that it "want[ed] to make sure that we give Mr. Diesso all his constitutional rights and not

25 _____
 26 ² People v. Marsden, 2 Cal.3d 118 (1970).

³ Faretta v. California, 422 U.S. 806 (1975)

1 just the one that talks about representing himself. I want to make sure that he has a fair and
2 impartial shot at this whole situation.” Id. at 12. Once again, petitioner interjected:

3 If the Court feels uncomfortable with me being in here, if I were to
4 represent myself, I can always be placed in the holding tank, and I
5 can hear just as very clearly as if I was standing here. And the
6 bailiff can run the papers back and forth, because they’ve done that
7 on other cases where there was disruptions in other courtrooms
8 where the person that went pro per. So I feel that if that is the
9 issue, I can – I have no problem being placed in there or being put
10 on the electric belt or whatever makes the Court happy.

11 Id. at 12-13. The court then ruled:

12 As I say, you know, we are trying to balance your constitutional
13 rights to represent yourself and trying to balance whether or not
14 this is the best thing for you and whether or not it’s something that
15 the Court should allow.

16 The concern the Court obviously has is the fact that, in this Court’s
17 opinion, the best predictor of future behavior is past behavior. We
18 have a situation where even in the CDC, which is a very highly
19 controlled environment and much safer for everybody than this
20 courtroom, you have not conducted yourself according to the rules.

21 While in my court on several occasions, you’ve acted out and
22 attempted to assault your attorney. You’ve been violent. I’ve had
23 to remove you from the courtroom and place you in the holding
24 cell next to my courtroom, and you acted out so much there, if
25 memory serves correctly, we had to remove you from this floor, so
26 we could conduct further hearings in your case.

You have acted out in such a way that I don’t find your statement
that you will not act out in the future to be credible. I find based
upon my personal observations of you that you engage in
purposeful behavior when you believe it somehow is going to
benefit you. And it’s this Court’s opinion that your acting out has
been entirely based upon your own specific intent to disrupt this
court and to build error into the record.

To allow you to represent yourself would be, in this Court’s
opinion, a huge mistake. It’s obvious that you are not competent to
represent yourself. If you take the records in these proceedings
since they began in its entirety, they clearly demonstrate that you
are not competent to represent yourself. I’m satisfied clearly that
you are mentally competent and that you’ve been fully informed of
your right to counsel. But I’m not satisfied that you really
understand what I’ve told you and what the consequences of your
contemplated act to represent yourself are.

1 I specifically find that you have not intelligently and voluntarily
2 waived your right to counsel, and to allow the defendant to attempt
3 to represent himself would be a farce and a sham. So the motion is
denied.

4 Id. at 13-14. Petitioner raised the issue on appeal from his conviction. The Court of Appeal
5 rejected his claim:

6 Defendant contends that the trial court erred in basing its denial of
7 the motion on the finding that his waiver was not knowing and
8 intelligent. *Faretta* holds that a defendant has the right under the
Sixth and Fourteenth Amendments to waive counsel and represent
himself or herself.

9 The record is clear that the trial court believed that defendant
10 would disrupt the court proceedings, and found that to allow him to
11 represent himself “would be a farce and a sham.” Defendant
12 asserts that the basis of the trial’s [sic] court’s ruling was that the
defendant’s waiver was not knowing and intelligent. The court
made its finding in the context of its grave concern that the
defendant would continue to disrupt the proceedings.

13 This basis alone would suffice to support the trial court’s
14 conclusion that defendant could not represent himself, and a ruling
will be upheld if it was correct on any basis.

15 A defendant who chooses self-representation must be able and
16 willing to abide by procedural rules and courtroom protocol. “The
17 right of self-representation is not a license to abuse the dignity of
the courtroom,” and self-representation may be terminated when a
18 defendant engages in “serious and obstructionist misconduct.” The
California Supreme Court has held that the trial court may deny a
19 motion for self-representation if it has a reasonable basis for
believing that self-representation will create a disruption. “Thus, a
20 trial court must undertake the task of deciding whether a defendant
is and will remain so disruptive, obstreperous, disobedient,
21 disrespectful or obstructionist in his or her actions or words as to
preclude the exercise of the right to self-representation.” The trial
22 court’s decision to terminate a defendant’s right to self-
representation is reviewed for abuse of discretion, and the *Welch*
23 court held the same deference should be applied “when it comes to
deciding whether a defendant’s motion for self-representation
should be granted in the first instance.”

24 Our review of the record reveals numerous pretrial proceedings at
25 which defendant was seriously disruptive. On one occasion he
refused to leave his prison cell to appear for a readiness
26 conference, and the court was forced to continue the conference.
In addition to the incidents cited by the trial court in its ruling on

the *Faretta* motion, the defendant had physically lunged at his attorney and “head-butted” him, spit on the bailiff, used foul language, and refused to speak when addressed directly by the court. “We are also aware that the extent of a defendant’s disruptive behavior may not be fully evident from the cold record, and that one reason for according deference to the trial court is that it is in the best position to judge defendant’s demeanor. Thus while no single one of the above incidents may have been sufficient by itself to warrant a denial of the right of self-representation, taken together they amount to a reasonable basis for the trial court’s conclusion that defendant could or would not conform his conduct to the rules of procedure and courtroom protocol, and that his self-representation would be unacceptably disruptive.” There was no abuse of discretion in the trial court’s denial of the *Faretta* motion here.

Answer, Ex. A at 20-22.

Both courts’ observations of petitioner’s behavior is borne out by this court’s review of the record. The following incidents occurred before the court denied petitioner’s Faretta requests:

- On April 12, 1999, the transcript reports that “the defendant makes physical contact with Mr. Moe [his lawyer at that time] and is restrained.” Before petitioner was removed from the holding cell, he said, “I’ll tell you right now, fool. This ain’t going down, mother fucker. It ain’t going down, punk.” He then yelled from the holding cell, “Hey, your ass is mine, Moe. Put that on the record.” 4/12/99 RT 5.
- On May 6, 1999, after an evaluation of petitioner’s competence to stand trial, petitioner interrupted the proceeding, prompting the court to ask, “Do we have any duct tape, gentlemen? Do you have something to gag him, because I’m not going to put up with this.” 5/6/99 RT 10.⁴ Later in the same hearing, a Marsden hearing, the court described petitioner’s demeanor in this fashion: “He comes out of my holding cell acting like an animal. He hears me say to the correctional officer, “Do you have any duct tape. . . .” and he immediately stops. There’s nothing wrong with this gentleman. This is all feigned. . . . and if he thinks that he’s going to manipulate the legal system, it’s not going to happen.” *Id.* at 11. As the hearing continues, the court reporter noted petitioner “burping” and “making noises.” *Id.* at 12, 13. This prompted the court to direct petitioner to be put in the holding cell. *Id.* at 13.

////

////

⁴ The May 6, 1999 transcript immediately follows that of the proceedings on April 13, 1999.

- The minutes for petitioner's arraignment on August 19, 1999 note, "Defendant became verbally + physically assaultive, he was removed from the courtroom + placed into a holding cell adjacent to the courtroom." CT 15. During the sanity phase of the trial, correctional officer Pappa described what had occurred: "I observed Mr. Diesso lunge toward his attorney, Mr. Oldwin, and head-butt him on the left side of his face. And after that, he was grabbed by the correctional staff and carried out of the courtroom. And just prior to being carried out of the courtroom, he turned and spat on the bailiff." RT 486.

B. Analysis

In Faretta, the Supreme Court held that a criminal defendant has a Sixth Amendment right to represent himself at trial after a knowing and voluntary waiver of the right to counsel and a trial court lacks discretion to deny a request so long as it is knowing, voluntary, and timely. 422 U.S. at 835.

In this case, petitioner argues that the trial court did not properly apply the Faretta standards, for it found he was mentally competent to represent himself yet also found that he had not validly waived his right to counsel. The Court of Appeal found that the denial was based not on an invalid waiver, but on the potential for disruption if petitioner represented himself.

In Hirschfield v. Payne, 420 F.3d 922 (9th Cir. 2005), the petitioner had made two motions to represent himself. The first had been denied as made for the purpose of delay, while the second was denied because the petitioner was unfamiliar with legal procedures. Id. at 927-28. The Ninth Circuit found the first denial proper, but the second was not. It recognized that had the second judge been aware of the prior ruling, he could have denied the second motion "on the separate ground that it was intended to cause delay." Id. at 928. However, the court recognized it could not deny habeas relief on the basis of "a hypothetical justification not actually relied on by the trial court." Id. It refused to "posit[] an alternative reason for the state court's decision . . . where the record reveals the state court did not base its decision on that alternative reason." Id. at 929; see also Van Lynn v. Farmon, 347 F.3d 735, 741 (9th Cir. 2003), cert. denied sub nom. Mitchell v. Van Lynn, 541 U.S. 1037 (2004) (refusing to uphold Faretta denial on grounds of timeliness when state court had used lack of competence; court would not "invent

1 an alternative rationale for the state court's decision which requires application of an entirely
2 different and unrelated legal principle" and then uphold the decision based on the alternative
3 rationale).

4 This case is not like Hirschfield and Van Lynn. Although the trial court said
5 petitioner had not validly waived his right to counsel, the Court of Appeal found that denial of
6 the Faretta motion was made "in the context" of the potential for disruption and found the denial
7 proper on that basis. The trial court did more than "initially express concern" about the potential
8 for disruption; the focus of its explanation was on the earlier disruptions and the predictive value
9 of those episodes. Accordingly, unlike Hirschfield and Van Lynn, this court need not "invent an
10 alternative rationale for the state court's decision" and may analyze the denial in the context of
11 petitioner's disruptive behavior.

12 The Faretta court observed:

13 We are told that many criminal defendants representing themselves
14 may use the courtroom for deliberate disruption of their trials. But
15 the right of self-representation has been recognized from our
16 beginnings by federal law and by most of the States, and no such
17 result has thereby occurred. Moreover, the trial judge may
18 terminate self-representation by a defendant who deliberately
19 engages in serious and obstructive misconduct. See Illinois v.
Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353. . . .

20 The right of self-representation is not a license to abuse the dignity
21 of the courtroom. Neither is it a license not to comply with
22 relevant rules of procedural and substantive law. . . .

23 Faretta, at 834 n.46. Moreover, as the Court has observed, the "government's interest in ensuring
24 the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his
25 own lawyer." Martinez v. California, 528 U.S. 152, 162 (2000). The Fourth Circuit has
26 explained:

27 A trial court must be permitted to distinguish between a
28 manipulative effort to present particular arguments and a sincere
29 desire to dispense with the benefits of counsel.

30 United States v. Frazier-El, 204 F.3d 553, 560 (4th Cir. 2000).

1 In this case, the court did not terminate petitioner's right to represent himself, but
2 rather denied his request based on the potential for disruption of the proceedings. This is not an
3 unreasonable application of clearly established federal law.

4 In United States v. Flewitt, 874 F.2d 669 (9th Cir. 1989), the court granted the
5 defendants' requests to represent themselves in a federal mail fraud prosecution, but thereafter
6 denied their repeated requests to be transported to a warehouse to inspect and categorize boxes of
7 documents they claimed were relevant to their defense. At a status hearing a week before trial,
8 defendants renewed their request. In response, the judge terminated their pro se status, finding
9 that they had refused to prepare for trial and so were incapable of representing themselves. Id. at
10 672. The Ninth Circuit reversed:

11 Pretrial activity is relevant only if it affords a strong indication that
12 the defendants will disrupt the proceedings in the courtroom. The
13 Supreme Court never suggested that the defendant's right to self-
14 representation could be terminated for failure to prepare properly
for trial. Rather, it stated that [t]he right of self-representation is
not a license to abuse the dignity of the courtroom.

15 Id. at 674 (internal quotations omitted).

16 In United States v. Brock, 159 F.3d 1077, 1079 (7th Cir. 1998), the court
17 terminated the defendant's pro se status before trial after he repeatedly refused to answer the
18 court's questions, challenged the court's jurisdiction, and demanded a bill of particulars. He
19 challenged this ruling on appeal. The Seventh Circuit upheld the conviction:

20 [W]hen a defendant's obstreperous behavior is so disruptive that
21 the trial cannot move forward, it is within the trial judge's
discretion to require the defendant to be represented by counsel.

22 Id. at 1079. The court acknowledged the Ninth Circuit's decision in Flewitt, but noted:

23 In Flewitt, the defendants' conduct merely affected the defendants'
24 chance of prevailing at trial; it did not prevent the trial from
proceeding. In contrast, Brock's steadfast refusal to answer the
25 court's questions made it extremely difficult for the court to
resolve threshold issues, such as whether the defendant would be
26 represented by counsel. Brock did not simply refuse to prepare for
trial, he refused to cooperate, even minimally, with the court.

Furthermore, Brock's obstructionist conduct persisted even after several contempt citations. It was, therefore, reasonable for the trial court to conclude that Brock's behavior strongly indicated that he would continue to be disruptive at trial.

Id. at 1080-81 (footnote omitted).

As Brock and Flewitt recognize, when pretrial behavior strongly indicates that a defendant will be disruptive at trial, a court is justified in revoking that defendant's pro se status before trial. Nothing in these cases, or in Faretta itself, suggests that a trial judge must first permit a defendant to proceed pro se before relying on the predictive power of his prior behavior to determine that the pro se defendant would disrupt the trial.

In Marshall v. Taylor, 395 F.3d 1058 (9th Cir.), cert. denied, ___ U.S. ___, 126 S.Ct. 139 (2005), the Ninth Circuit considered the interaction between state and federal rulings concerning the timeliness of a Faretta request. It noted:

The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is Supreme Court precedent existing at the time of the state court's decision. Supreme Court precedent includes not only bright-line rules it establishes but also the legal principles and standards flowing from them.

Id. at 1060. The court noted that Supreme Court guidance on "the permissible timing of a Faretta request is scarce," and concluded:

Because the Supreme Court has not clearly established when a Faretta request is untimely, other courts are free to do so as long as their standards comport with the Supreme Court's holding that a request "weeks before trial" is timely.

Id. at 1061.

This case is similar, in that Supreme Court precedent on the question of when a disruptive defendant's request to represent himself may be revoked or denied is scarce. The California Supreme Court has concluded that "the same rule" concerning the termination of the right of self-representation of an obstructionist defendant

////

1 applies to the denial of a motion for self-representation in the first
2 instance when a defendant's conduct prior to the *Faretta* motion
3 gives the trial court a reasonable basis for believing that his self-
representation will create disruption.

4 People v. Welch, 20 Cal.4th 701, 735 (1999). The Court of Appeal relied on Welch in reaching
5 its decision in this case. Answer, Ex. A at 21.

6 The Welch court's holding comports with Faretta and with Brock and Flewitt's
7 recognition of the predictive value of pretrial behavior. The Court of Appeal's determination
8 therefore is neither contrary to nor an unreasonable application of the "principles and standards"
9 flowing from Faretta. Moreover, the court did not make an unreasonable factual determination
10 by relying on petitioner's earlier disruptions as establishing the "strong indication" that he would
11 use his pro se status to continue his obstructionist behavior. The record shows his disruptions
12 were serious and continued even after he was removed from the courtroom. There was no
13 federal constitutional error.

14 IV. Jury Instruction On Mental State

15 In California, "all murder which is perpetrated by means of . . . lying in wait" or is
16 "willful, deliberate, and premeditated" is first degree murder. Cal. Pen. Code § 189. In this case,
17 the prosecutor proceeded on these two theories in pursuing the first degree murder charge against
18 petitioner. See RT 336-338.

19 Petitioner argues that CALJIC No. 3.32, the jury instruction on mental state, failed
20 to inform the jury it could consider evidence of petitioner's mental illness in determining the
21 mental state of lying in wait and did not make it clear to the jurors that evidence of petitioner's
22 mental illness need only raise a reasonable doubt as to the existence of the required mental states.

23 The trial court instructed the jury:

24 You have received evidence regarding a mental disease, mental
25 defect or mental disorder of the defendant at the time of the
26 commission of the crime charged, namely, murder in Count 1 or
lesser crimes thereto, namely, murder in the second degree and
voluntary manslaughter. You should consider this evidence solely

for the purpose of determining whether the defendant actually formed the specific intent, premeditated, deliberated or harbored malice aforethought, which are elements of the crime charged in Count 1, namely murder.

RT 385. The Court of Appeal rejected petitioner's challenge:

Lying in wait is one form of deliberate and premeditated murder. A showing of lying in wait obviates the necessity of separately proving premeditation and deliberation. In other words, lying in wait is the functional equivalent of proof of a premeditated, deliberate intent to kill.

The jury was first instructed with CALJIC No. 8.25, which was given without modification. It defined the state of mind for lying in wait as "equivalent to premeditation and deliberation." . . .⁵ The jury was then instructed with CALJIC No. 3.32, as modified by the court. CALJIC No. 3.32 instructed the jury that it could consider defendant's mental state in determining whether he premeditated or deliberated. The jury also received the standard instruction that as to the murder charge, "there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists the crime to which it relates is not committed." Together, these instructions advised the jury that defendant's mental disorder was relevant to its consideration of whether he had the required mental state for murder; because lying in wait is equivalent to premeditation, CALJIC No. 3.32 necessarily included it in the mental states as to which defendant's mental disorder could be considered.

.....

Defendant further faults the instruction on the basis that it failed to make clear that the evidence of mental defect "need only be

⁵ The 8.25 instruction as given read:

Murder which is immediately preceded by lying in wait is murder of the first degree. The term lying in wait is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise, even though the victim is aware of the murderer's presence. The lying in wait need not continue for any particular period of time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.

RT 382; CT 389.

capable of raising a reasonable doubt about the existence of the required mental states,” thereby depriving defendant of his constitutional right to require that every element of his crime be proved beyond a reasonable doubt. We disagree. The jury was instructed that the prosecution’s burden was to prove the case beyond a reasonable doubt and, specifically, that each piece of prosecution evidence must be proved beyond a reasonable doubt. Defense counsel argued reasonable doubt in his closing, including a specific argument that the jury must be convinced beyond a reasonable doubt that defendant had the requisite intent for the crimes. The burden was clear.

Here the question is whether there is a reasonable likelihood that the jury understood the charge as the defendant asserts. (*People v. Kelly* (1992) 1 Cal.4th 496, 525, quoting *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73 & fn. 4.) We conclude there is no reasonable likelihood that the jury understood it could not apply the evidence of mental disorder to the lying in wait instruction, or understood the instruction to abrogate the prosecution’s burden of proof.

Answer, Ex. A at 17-20 (internal quotations and most citations omitted).

A challenge to jury instructions does not generally state a federal constitutional claim. See *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing *Engle v. Isaac*, 456 U.S. 107, 119 (1982)). In order to warrant federal habeas relief, a challenged jury instruction cannot be merely “undesirable, erroneous, or even universally condemned, but must violate some due process right guaranteed by the fourteenth amendment.” *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). Moreover, “not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation.” *Middleton v. McNeil*, 541 U.S. 433, 437 (2004). An ambiguous jury instruction creates constitutional error if “there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence,” or otherwise “in a way that violates the Constitution.” *Boyde v. California*, 494 U.S. 370, 380 (1990) (instruction on mitigating evidence in a capital case); *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (adopting *Boyde* test for other challenges to ambiguous jury instructions). In making this determination, a single instruction “may not be judged in artificial isolation, but must be viewed in the context of the overall charge.” *Boyde*, 494 U.S. at 378.

1 /////

2 A. Mental State Evidence And Lying In Wait

3 In California, evidence of a defendant's mental illness, defect or disorder is
4 admissible "on the issue of whether or not the accused actually formed a required specific intent,
5 premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is
6 charged." Cal. Pen. Code § 28(a). Petitioner presented such evidence in the guilt phase and the
7 jury was instructed to consider it "solely" when evaluating whether he "actually formed the
8 specific intent, premeditated, deliberated or harbored malice aforethought." RT 385. Petitioner
9 argues the use of the word "solely" and the failure to list lying in wait as one of the mental states
10 covered by the instruction prevented the jury from considering the evidence of petitioner's
11 mental state when evaluating whether he was guilty of first degree murder on a theory of lying in
12 wait.

13 As the Court of Appeal noted and the jury in this case was instructed, proof of
14 lying in wait "acts as the functional equivalent of proof of premeditation, deliberation and intent
15 to kill." See People v. Ruiz, 44 Cal.3d 589, 614 (1988). An equivalent is something "having
16 equal or corresponding import, meaning, or significance: chiefly of words and expressions," or
17 "that is virtually the same thing; identical in effect; tantamount." Oxford English Dictionary
18 Online at <<http://dictionary.oed.com>> (accessed 8/21/06). Accordingly, the jury was told to
19 consider the evidence of petitioner's mental illness solely in connection with its determination
20 whether petitioner possessed the necessary mental states of premeditation and deliberation and
21 was told that lying in wait was "of equal meaning" and "virtually the same thing" as
22 premeditation. Given the equivalence of the terms, the use of the word "solely" in CALJIC No.
23 3.32 did not prevent the jury from considering the evidence of petitioner's mental illness in
24 connection with the theory of lying in wait. The Court of Appeal's decision did not unreasonably
25 apply clearly established federal law.

26 /////

1 /////

2 B. Raising A Reasonable Doubt

3 Petitioner argues that the instruction failed to inform the jury that his evidence of
4 mental illness could be the basis of a different verdict if it merely raised a reasonable doubt about
5 whether the prosecution had met its burden and that this deprived him of his right to hold the
6 prosecution to its burden of proving every element beyond a reasonable doubt.

7 The “clearly established federal law” against which this claim must be measured
8 is In re Winship, 397 U.S. 358 (1970), which recognized that the due process clause requires
9 “proof beyond a reasonable doubt” of every element necessary to a finding of guilt. A jury
10 instruction that, in context, fails to give effect to that requirement violates a defendant’s
11 constitutional rights. Bruce v. Terhune, 376 F.3d 950, 955 (9th Cir. 2004). However, as with
12 most claims of jury instructional error, this claim must be evaluated in the context of the
13 instructions as a whole. Boyde, 494 U.S. at 378.

14 Here, the jury was instructed that

15 each fact which is essential to complete a set of circumstances
16 necessary to establish the defendant’s guilt must be proved beyond
17 a reasonable doubt. In other words, before an inference essential to
18 establish guilt may be found to have been proved beyond a
19 reasonable doubt, each fact or circumstance on which the inference
20 necessarily rests must be proved beyond a reasonable doubt.

21
22
23

24 A defendant in a criminal action is presumed to be innocent until
25 the contrary is proved, and in case of a reasonable doubt whether
26 his guilt is satisfactorily shown, he is entitled to a verdict of not
guilty. This presumption places upon the People the burden of
proving him guilty beyond a reasonable doubt.

.....

In the crime charged in Count 1. . . there must exist a union or joint
operation of act or conduct and a certain specific intent in the mind
of the perpetrator. Unless this specific intent exists, the crime to
which it relates is not committed.

.....

In the crime charged in Count 1. . . there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator. Unless this mental state exists, the crime to which it relates is not committed.

RT 369, 378, 379; CT 362, 381, 382, 383. These instructions informed the jury of the prosecution's burden in general and on the issues of intent and mental state. The Court of Appeal did not apply federal law in an unreasonable fashion in rejecting this claim of error.

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 22, 2006.


UNITED STATES MAGISTRATE JUDGE